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Ronald K. Neilsen, Marina Mechanics Enterprises, and Astro Steel Corporation v. Forever Living Products Inc. : Brief of Appellant

Utah Court of Appeals

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IN THE COURT OF APPEALS OF THE STATE OF UTAH

RONALD K. NEILSEN, dba MARINA MECHANICS ENTERPRISES, and ASTRO STEEL CORPORATION, a Utah corporation (Intervenor),	:	
Plaintiffs-Appellants,	:	
vs.	:	APPEAL NO. 880039-CA
FOREVER LIVING PRODUCTS, INC.,	:	
Defendant-Respondents.	:	

* * * *

BRIEF OF APPELLANT RONALD K. NEILSEN D/B/A MARINA MECHANICS ENTERPRISES

* * * *

Appeal from the Judgment of the Third Judicial District Court of Salt Lake County, State of Utah, The Honorable Timothy R. Hanson, presiding. Argument priority 14b.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE

STATUTES

OTHER AUTHORITIES

JURISDICTION

The Utah Supreme Court had original jurisdiction over this matter pursuant to Utah Code Ann. Section 78-2-2 since this was an appeal from a final judgment and order in a civil matter in the Third Judicial District Court in and for Salt Lake County, State of Utah. This matter was transferred to the Court of Appeals by authority of Utah Code Ann. Section 78-2-2(4) in an Order dated January 15, 1988. Therefore, jurisdiction is appropriate.

STATEMENT OF THE CASE

NATURE OF PROCEEDING

This is an appeal from an Order and Judgment of the Third Judicial District Court of Salt Lake County, State of Utah, the Honorable Timothy R. Hansen presiding, ordering judgment for Defendant/Respondent and assessing costs against Plaintiffs/Appellants.

COURSE OF PROCEEDINGS

The Amended Findings of Fact, Conclusions of Law and Judgment appealed from were entered on or about September 11, 1987. On or about October 8, 1987, Judge Hanson entered an Order extending the time for filing a Notice of Appeal on behalf of the Appellant "Neilsen" from October 9, 1987 through November 9, 1987. Appellant "Astro" filed their Notice of Appeal on October 9, 1987, and Appellant "Neilsen" filed a Notice of Appeal on November 9, 1987.

STATEMENT OF FACTS

This action rises out of the construction of a marina on Callville Bay, Lake Mead, Nevada, Defendant/Respondent being the owner and Marinas Internationale became the general contractor on December 14, 1984 (Amended Findings of Fact (Addendum D) "AF" paragraph 5).

(a) On or about March 1, 1985, Marinas Internationale, the general contractor hired by Forever Living Products, Defendant/Respondent, (hereinafter "FLP") entered into a subcontract with Plaintiff/Appellant "Neilsen", entitled an "Installment Contract", whereby "Neilsen" was to perform services relative to the construction of the marina. (AF paragraph 8).

(b) The base dollar amount for the construction of the marina per the general contract between "FLP" and Marinas Internationale was $2,083,760.00. The General Contract (hereinafter "Contract", Addendum A) also contained a mechanism whereby Marinas Internationale was to be paid an amount for anchoring the dock system, based upon actual cost, but not to exceed $101,740.00. After some storm damage occurred to the project, a change order added an additional $26,713.00 to the general contract amount. (AF paragraph 6).

(c) The Installation Contract between Marinas Internationale and "Neilsen" required Marinas Internationale to pay "Neilsen" $150,696.00 for the installation of the dock, which was based on a price of $1.75 per square foot for 86,112 square feet of dock and to install the roof for a price of $304,900.00.

(AF paragraph 9 and Transcript "T" Vol. 3 pp 135-147).

(d) On or about March 28, 1985, a change order to the contract between Marinas Internationale and Marina Mechanics was issued requiring Marina Mechanics to fabricate and provide certain anchor blocks on the marina at an additional cost to Marinas Internationale of $41,211.00. (AF paragraph 11).

(e) Beginning with the original down payment in December of 1984, and continuing through February, March, April, May and to June 10, 1985, "FLP" paid a total of $2,109,168.50 to Marinas Internationale for materials they thought had been delivered to the site and for labor involved in the construction of the project. (AF paragraph 12).

(f) On or about June 13, 1985, Marinas Internationale, the general contractor, filed for relief under Chapter 11 of the United States Bankruptcy Code. (AF paragraph 13).

(g) After the bankruptcy filing, "Neilsen" refused to perform further work unless some measures were taken to ensure payment to him for such work. On June 21, 1985, a joint accommodation was reached among "Neilsen," "FLP" and Marinas Internationale whereby "Neilsen" would be paid by joint check (payable jointly to "Neilsen" and Marinas Internationale) based upon time and material invoices submitted. "Neilsen" proceeded and continued to perform work on this basis until August 26, 1985. (AF paragraph 14).

(h) On or about July 9, 1985, a severe storm arose in the Lake Mead area and extensively damaged the marina, which was

still under construction at the time.

(i) On or about August 26, 1985, "Neilsen" ceased performing construction work in Nevada. (AF paragraph 15).

(j) On or about October 16, 1985, the Department of Interior submitted a letter to FLP acknowledging completion of the marina and giving its approval to open approximately one-half of the marina slips at the Callville Bay Marina. (AF paragraph 18).

(k) On or about January 6, 1986, the Department of the Interior, National Park Service submitted another letter to "FLP" giving its approval to open the completed marina. (AF paragraph 19).

(l) "Astros" contract was with "Neilsen" to supply steel structural materials for a roof structure over a portion of the docks, such contract being entered into after "Neilsen" contracted with Marinas Internationale. (T Vol. 3, pp 135-147).

(m) The original contract between "FLP" and Marinas Internationale and the "Installation Contract" between "Neilsen" and "FLP" contemplated third party beneficiaries. (AF paragraph 8).

(n) "Astro" had no obligation, contractually or otherwise, and did not do anything but supply materials to the construction site. "Astro" was a materialman only. (T. Vol 3, pp 135-147).

ISSUES PRESENTED

(a) Whether Respondent has been unjustly enriched by Appellants. The trial court found insufficient evidence for Neilsen's unjust enrichment claim. However, the record substantiates that there is more than sufficient evidence to support said claim and the Court erred in its judgment on this issue.

(b) Whether "Neilsen", as a third-party beneficiary under the terms of the lease entered into between "FLP" and the Department of Interior or the contract referred to above is subject to all defenses that could be raised as against Marinas Internationale.

(c) Whether or not the evidence supports a finding that no oral agreements were made by "FLP" to Appellant "Neilsen."

(d) Whether "FLP's" negligence in administering its contract with Marinas Internationale resulted in damage compensable to "Neilsen."

(e) Whether "Astro" was damaged by the negligence of "FLP," other than economically, in "FLP's" administration of its contract.

(f) Whether "Astro," as a materialman only, "steps into the shoes" of the contractor, or subcontractor and is subject to <u>all</u> defenses "FLP" could raise as against a contractor or subcontractor.

SUMMARY OF ARGUMENT

The Plaintiff/Appellant in this case, Ronald Neilsen d/b/a Marina Mechanics (hereinafter "Neilsen), is asserting a number of claims against the Defendant/Respondent Forever Living Products (hereinafter "FLP"). First, Neilsen is arguing that FLP was unjustly enriched by the work performed by Neilsen during the initial contract period prior to the bankruptcy of Marinas Internationale (hereinafter "MI"), for work performed during the second contract period from June 13 through July 9, when a storm damaged the construction project, and the third contractual period of approximately July 12 through August 26, 1985 when Neilsen was removed from the project. FLP claims that it was unjustly enriched because it paid the full contract price. Neilsen asserts the full contract price was paid to the wrong individuals and this improper payment was due to FLP's incompetency and, therefore, the payment should not be considered a defense.

Neilsen also argues that due to its third-party beneficiary status it can recover against FLP. The Court found that Neilsen had third-party beneficiary status, but also found that FLP could assert the liquidated damages delay provision of the Contract against Neilsen and, therefore, Neilsen could recover nothing. Neilsen asserts that particular provision of the contract should not be applied to him based on the impossibility of performance which was created by FLP. Neilsen also asserts that FLP waived its right to assert the liquidated

damages provision by continuing to pay MI even though MI was in breach of the completion date of the Contract. Neilsen asserts that the liquidated damage provision was waived by FLP under the terms of the Contract, specifically paragraph 23.3 when it made its final payment to MI on June 10, 1985. This waiver then would preclude the assertion of the liquidated damages provision against Nielsen or Astro Steel.

Neilsen also asserts that there was an oral agreement made between FLP and Neilsen to recoup Neilsen's losses to MI. The Trial Court ruled that such an oral agreement was within the Nevada Statute of Frauds and, therefore, precluded a finding that Neilsen could recover. Neilsen argues that the oral agreement for recoupment of his losses was an inducement to have Neilsen continue on the project and to see the project to completion. Neilsen argues that part performance and FLP's inducement takes the agreement out of the Statute of Frauds and would allow Neilsen to recover his damages.

Lastly, Neilsen argues that he was injured through FLP's negligent administration of the contract. The Court found that economic loss is not recoverable. However, Neilsen asserts that the growing trend in cases of this nature is to allow recovery for economic loss and that under the circumstances of this case, particularly with the language of the contract, it would be appropriate.

ARGUMENT

I

DEFENDANT FOREVER LIVING PRODUCTS WAS UNJUSTLY ENRICHED BY THE WORK OF THE PLAINTIFF RONALD NEILSEN D/B/A MARINA MECHANICS DUE TO FOREVER LIVING PRODUCT'S FAILURE TO PROVIDE PAYMENT FOR THE WORK PERFORMED BY NEILSEN AND BY FAILING TO TAKE ADEQUATE STEPS TO SEE THAT PAYMENTS MADE FOR SAID WORK WERE PAID TO SUBCONTRACTORS AS REQUIRED BY THE CONTRACTUAL AGREEMENT BETWEEN FOREVER LIVING PRODUCTS AND MARINAS INTERNATIONALE.

A. INTRODUCTION

It has been urged by Defendant Forever Living Products ("FLP") that this case is a simple question of "a contractor going bad" and leaving a subcontractor without payment. Unfortunately, this matter is not that simple. There are a number of factors which complicate the contractual arrangement and the issues. As set forth in the Statement of Facts, this project, at least as far as Neilsen is concerned, involved three separate contract terms. The original written contract between FLP and MI was essentially suspended on June 13, 1985 when MI took out bankruptcy. At that time, FLP reached an accommodation with MI and Neilsen for the completion of the work. There is no indication that the terms of the original contract were ever incorporated into the accommodation. This occurred on or about June 21, 1985.

Subsequent to the accommodation, the project was severally damaged by a windstorm on Callville Bay. This required further modifications of any "contracts" that were in existence

at that time. That effectively ended the second contractual period and began the third contractual period with Neilsen being paid on invoices submitted on a weekly basis. (T. Vol. II, pp 40-45).

Forever Living Products holds itself out to be a simple customer seeking to have a project built and not receiving the benefit of its contract. What FLP fails to present is the fact that on June 13, 1987 when MI filed for bankruptcy, FLP had already breached the written agreement.

The written agreement required FLP to meet a certain payment schedule and to see that subcontractors were adequately compensated (Addendum A). Neither had taken place on June 10 when FLP made the final payment on the Contract (T. Vol IV, pp 121-145). Based on the language of the Contract, subcontractors had a right to rely on the terms of that agreement. (Addendum A).

In paying out the full amount under the Contract to Marinas Internationale, in violation of the terms of the contract, the subcontractors, specifically Neilsen and Astro Steel, were injured. FLP also breached the contract in allowing MI to miss the scheduled completion dates of May 1 and June 1 without asserting its rights for liquidated damages. In the proceeding against it, FLP claimed that the liquidated damages it failed to assert against Marinas Internationale should somehow now be asserted against Neilsen and Astro Steel as third-party beneficiaries. From the testimony of Tom Mace (T. Vol. IV, pp

121-45), it is clear that the only thing FLP was concerned about was getting its marina completed; even if the completion, and the means of accomplishing that goal, were detrimental to the rights and obligations it owed to subcontractors.

B. FOREVER LIVING PRODUCTS WAS UNJUSTLY ENRICHED BY THE WORK PERFORMED BY NEILSEN BOTH PRIOR AND SUBSEQUENT TO THE BANKRUPTCY OF MARINAS INTERNATIONALE AND PRIOR TO THE JOINT ACCOMMODATION.

1. Legal Standard

The doctrine of unjust enrichment is, in effect, the creation of a contract where none existed. FLP insists that Neilsen has no contractual rights against it under the agreement. Neilsen asserts that he in fact does have certain rights under the contract, but if this Court should rule that he didn't, the doctrine of unjust enrichment would apply to the circumstances. The legal standard for unjust enrichment has been clearly set out by the Supreme Court of Nevada in Unionamerica Mortgage and Equity Trust v. McDonald, 626 P.2d 1272 (Nev. 1981). In the Unionamerica case, the Court indicates that the purpose of this kind of relief is to "do justice to the parties regardless of their intention, Trollope v. Koerner, 470 P.2d 91 (1970)," at 1273.

In this case, Neilsen maintains that FLP's intent in the original agreement was to confer benefits and protections upon subcontractors. However, even if that were not the intent of the parties, the doctrine of unjust enrichment would apply and Neilsen can recover for work performed.

In the Unionamerica case, the Court, in citing Dass v.

Epplen, 424 P.2d 779, 780 (Colo. 1967), said:

> "The essential elements of quasi contract are a benefit conferred on the defendant by the plaintiff, appreciation by the defendant of such benefit and acceptance and retention by the defendant under circumstances such that it would be inequitable for him to retain the benefit without payment of the value thereof."

This can then be broken down into the four elements as set forth above: (1) A benefit to Defendant; (2) Appreciation by the Defendant of the benefit; (3) Acceptance by the Defendant of such a benefit; (4) Retention of the benefit under circumstances that would be inequitable. It is clear from the standards as set forth by the Court that the factual circumstances of each case will make the critical difference in determining whether or not unjust enrichment has occurred and whether Plaintiff can recover from said unjust enrichment.

2. Factual Standard.

As stated above, the Court must make a factual determination in each individual case to determine if the equities require recovery under the doctrine of unjust enrichment, see Costanso v. Stewart, 453 P.2d 526 (Ariz. 1969); Paschall's Inc. v. Dosier, 407 S.W.2d 150 (Tenn. 1966) and the related discussions in 62 ALR 3rd 288.

In this case, the Appellant does not challenge the trial court's findings of fact as to the claim itself because Plaintiff asserts that the trial court's findings establish a claim for unjust enrichment. The Appellant does assert, however, that the Court misapplied the facts to the law and therefore the

judgment and ruling must be reversed.

It is undisputed that Neilsen performed a substantial amount of work on FLP's Callville Bay project. It is also undisputed that work was performed by Neilsen from March 11, 1985 through and including June 13, 1985, the date MI filed for bankruptcy, (see Amended Findings of Fact paragraphs 10, 11 and 14) and subsequent to that date to August 26, 1985.

Defendant cannot assert that it was not enriched by the work performed by Neilsen. By June 10, 1985, fully thirty to forty percent of the Marina installation had been completed. This was not in compliance with the terms of the contract; however, FLP made no assertions as to its rights under liquidated damages provisions at that time or at any other time prior to trial. There is also no dispute that FLP appreciated the work performed by Neilsen in that by June 10, 1985, FLP had in fact paid out the full contract price to Marinas Internationale. One has to assume that FLP would not have paid out the contract price had the work not been appreciated. The key issue of dispute then is whether or not FLP's failure to pay the amount requested by Defendant as set forth in Plaintiff's Exhibit 25 and invoices is inequitable.

3. FLP's Retention of the Work Performed By Neilsen Without Paying as Asserted by Neilsen at Trial was Inequitable.

In this case, FLP has asserted that it was not unjustly enriched in that it paid out the full contract price for the work that was performed. In fact, FLP asserts that it paid out more

than the full contract price for the work performed. This may normally be an adequate defense as to the fourth factor set out in Unionamerica, but for the fact that FLP's payments were improper and in violation of the terms of the contractual agreement.

As set forth earlier, FLP had an obligation to subcontractors to see that payment was made. FLP was also obligated to a certain payment schedule in the agreement, and based on the language of paragraph 20 in said agreement, subcontractors had a right to rely on FLP's adherence to the schedule. By June 10, 1985, even though the work was only thirty to forty percent complete and even though MI was a full forty days late in completing the project with absolutely no hope of completing the project in the near future, FLP made the final payment on the contract. This in effect ended any possibility that the subcontractors would ever receive payment.

This was done with the knowledge that the marina was only thirty to forty percent complete. FLP had an agent on site who was verifying shipment of materials. However, this agent either failed to properly notify FLP or FLP ignored the fact regarding completion. Therefore, equities would dictate that FLP, by failing to live up to its own payment schedule and contractual obligations, did not merely "pay for the contract" but rather over paid MI and failed to pay the appropriate parties. Because of its breach of obligations, FLP cannot assert that payment has been made. This makes no more sense than

allowing an individual to assert a defense against a creditor by claiming that it paid to much to another creditor. Therefore, FLP has been unjustly enriched and Neilsen has been damaged as set forth in his testimony and exhibits. The Court's ruling on this matter should be reversed and judgment entered for Appellant.

II

NEILSEN AND FOREVER LIVING PRODUCTS ENTERED INTO AN ENFORCEABLE ORAL AGREEMENT IN WHICH FOREVER LIVING PRODUCTS AGREED TO PAY THOSE SUMS DUE NEILSEN THAT WERE NOT PAID BY MARINAS INTERNATIONALE AS REQUIRED UNDER THE CONTRACTS AND CHANGE ORDERS.

On June 21, 1985, the Defendant FLP entered into an accommodation with the Plaintiff Neilsen and MI. As part of this joint accommodation, Neilsen was to remain on site and complete the work that MI had failed to complete. This accommodation included an oral agreement by FLP to pay for the unpaid debts owed by Marinas Internationale to Neilsen. The evidence regarding these items were testified to by Ron Neilsen and are contained in Volume 1 of the transcript, pages 84-92.

FLP has set forth that the oral promise to pay for another is barred by the Nevada Statute of Frauds, N.R.S. 111.220. It is true that the Statute of Frauds does apply to the situation where one agrees to answer to that of another. However, there are certain circumstances under which the Court will remove the oral contract from the statute of frauds. In this case, FLP used the oral agreement to repay losses as an inducement to keep Neilsen on site and to enter into the accommodation to continue work.

This period constitutes the second contractual period involved in the project. Neilsen did in fact rely upon the statements made by FLP and agreed to the accommodation. He also continued work on the project under the terms of the

accommodation.

Nevada case law recognizes that, under the Statute of Frauds, certain equities can be taken into account to prevent inequitable results due to oral agreements. In Zunino v. Paramore, 435 P.2d 196 (Nev. 1967), the Nevada Supreme Court indicated that an agreement normally required to be in writing could be taken out of the Statute of Frauds if elements exist which amount to part performance. In a previous case, Harmon v. Tanner Motor Tours of Nevada Ltd., 377 P.2d 622 (Nev. 1963), the Court ruled that in that particular situation, if there was only a promise to reduce an agreement to writing, it was insufficient to take the agreement out of the Statute of Frauds. The Court went on further to indicate that part performance alone was also insufficient to remove an oral agreement from the Statute of Frauds. However, the Court then ruled that a combination of the promise to reduce to writing and part performance would be sufficient to remove the oral agreement from the statute.

In the case before us, Neilsen testified he entered into an oral agreement with FLP in which FLP would pay the sum due from MI (see Exhibit 25, Addendum B) and would continue to pay Neilsen to complete the Marina. FLP agreed to reduce the agreement to writing and did so as to the ongoing work. Based upon the agreements, Neilsen continued to perform work for FLP until August 26, 1985. This continued work clearly shows the part performance both on the part of Neilsen and on the part of FLP in furtherance of their oral and subsequent written

agreement.

In a later case, Schreiber v. Schreiber, 663 P.2d 1189 (Nev. 1983), the Supreme Court of Nevada determined that part performance alone would be sufficient to remove the oral agreement from the Statue of Frauds. FLP induced Neilsen into the agreement to continue work by orally agreeing to pay for expenses incurred that were due him from Marinas Internationale.

The other occurrence that would take an oral agreement out of the Statute of Frauds is detrimental reliance upon representations made by FLP. Neilsen clearly stayed on the job even though he could have left and perhaps had other paying contracts. He took FLP at its word and believed that the Company would make up the losses suffered at the hands of MI. This detrimental reliance is one more factor in removing the oral agreement from the Statute of Frauds. See Alpark Distributing Company v. Poole, 600 P.2d 229 (Nev. 1979).

While it may be argued that FLP did nothing but remain silent regarding its agreement to recoup losses incurred by Neilsen, the Nevada Court has ruled that silence can be just as crucial a factor as assent. In fact, it stated that "... The principal is obligated to exercise due care and to conduct himself as a reasonably prudent business person with normal regard for the interest of others", Goldstein v. Hanna, 635 P.2d 290, 292 (Nev. 1981).

Careful review of the testimony presented in the transcript will show that the trial court clearly erred in

determining that there was an oral agreement that was bound by the Statute of Frauds. The representations by FLP regarding the repayment or recouping of losses from MI induced Neilsen to remain upon a job to his detriment. There was sufficient testimony to establish the amount of damages owed under the oral representation. FLP's conduct clearly takes the oral agreement out of the Statute of Frauds and creates an enforceable agreement between the parties.

III

NEILSEN, AS A THIRD-PARTY BENEFICIARY, IS NOT BARRED FROM RECOVERY DUE TO THE BREACH OF MARINAS INTERNATIONALE.

A. NEILSEN IS NOT SUBJECT TO EVERY DEFENSE FLP COULD ASSERT AGAINST MI.

FLP has correctly asserted the general rule in third-party beneficiary cases. The Oklahoma Court in Britton v. Groom, 373 P.2d 1012 (Okla. 1962) stated "a third-party beneficiary who seeks to enforce a contract does so subject to the defenses that would be valid as between the parties." However, in Morelli v. Morelli, 720 P.2d 704 (Nev. 1986), the Court, after citing Britton v. Groom, determined that the general rule is not always applicable.

In the Morelli case, a contract existed between an individual and his former wife. This contractual agreement involved tuition for their minor child to attend college. The former wife breached the agreement. However, the Morelli court held that the child, upon reaching the age of majority, could enforce the contract as the third-party beneficiary. When the father asserted the defense that was created by the former wife's non-performance, the Court determined that since the former wife was dead, it was impossible for her to perform that portion of the contract and allowed the third-party beneficiary to enforce the contract even though the defense of non-performance or breach was "available."

Therefore, in Morelli, the Court found that the general

rule is not applicable in all cases. If the party that was to perform or the individual third-party beneficiary couldn't perform the obligations under the contract, the general rule cannot apply. This impossibility to perform, in effect, discharges that portion of the contract that is impossible to perform.

In this case, it is clear that Astro Steel does not and did not have the expertise to complete the project. Therefore, it would be impossible for Astro Steel to perform the contract. Any failure of performance is discharged by Astro's impossibility to perform and therefore the liquidated damages defense is not available.

A similar argument holds true as to Neilsen. Neilsen could not perform on the installation contract due to a number of breaches by FLP. Under the terms of the contract, FLP had an obligation to monitor the payments and the delivery of materials to the site. Due to FLP's failure to properly monitor delivery and payment (testimony of Tom Mace, supra), Neilsen was unable to complete the project. Sufficient material to complete the marina was never on site prior to the completion dates as set forth by FLP.

Had FLP properly monitored the contract with its on site agent, Neilsen may have been able to perform the contract and not have lapsed into a delay situation. This failure by FLP made the contract impossible to perform and, therefore, the defense raised by FLP is discharged and not applicable to the

third-party beneficiary Neilsen.

B. NEILSEN IS NOT SUBJECT TO THE LIQUIDATED DAMAGES BECAUSE FLP WAIVED ITS RIGHTS TO LIQUIDATED DAMAGES BY CONTINUING TO MAKE PAYMENTS AFTER MI WAS IN BREACH OF THE CONTRACT.

1. FLP Waived Its Rights to Assert the Liquidated Damages Clause.

In paragraph 23.3 of the Contract, the Contract indicates that:

> "The making of final payments shall constitute a waiver of all claims by the customer except those arising from (1) unsettled liens; (2) faulty or defective work appearing after substantial completion; (3) failure of the work to comply with the requirements of the contract documents; or (4) terms of any special warranties required by the contract documents."

When FLP made the final payment to MI on June 10, 1985, it waived its rights to any of the liquidated damages pursuant to the terms of paragraph 23.3. It may be argued that the delay is a "failure of the work to comply with the requirements of the contract documents" but without specific language referring to delay, Neilsen asserts that that provision of the contract does not apply.

While FLP may not have waived its liquidated damages rights in writing, conduct can be just as important as any written agreement. In fact, the waiver can easily be inferred from the conduct of FLP in this situation. At no time was any testimony presented that FLP asserted any of the clauses set forth in paragraph 23.3 as to MI or any other party. FLP made its final payments and this conduct clearly puts it within the confines of paragraph 23.3, see Udevco, Inc. v. Wagoner, 678 P.2d

679 (Nev. 1984).

Even if the provisions did not exist in the contract in paragraph 23.3, an owner can implicitly waive its liquidated damages rights by continuing to make payments and making the final payment under the contract, E.V. Cox Construction Co. vs. Brookline Associates, 604 P.2d 816 (Okla. App. 1979). By its own evidence, FLP paid out a substantial amount of money to MI after MI was already in breach of the completion date provision. There is no evidence to suggest that FLP ever asserted its liquidated damages right against MI let alone prior to making its final payment.

2. FLP's Conduct Interfered With Neilsen's Ability to Perform on the Contract and Therefore, FLP is Estopped From Asserting the Defense.

FLP was responsible for a number of obligations under the contract. FLP was responsible for monitoring the progress and seeing that payments were made only under the schedule as progress was made. FLP's failure to monitor these correctly prevented on-time deliver of steel and materials which, in turn, interfered with Neilsen's ability to finish the marina.

FLP's payments were in breach of the contract and removed all incentive of MI to fulfill the obligations of the contract. This in turn impeded Neilsen's ability to complete the contract. In that FLP contributed to the delay through its conduct, it cannot assert that delay as a basis for collection of damages, see Higgins v. City of Fillmore, 639 P.2d 192 (Utah 1981). FLP should have been or was well aware of the delays and

made no attempts whatsoever to take corrective action. Therefore, the liquidated damage clause should not be applied to third-party beneficiaries.

C. FLP CANNOT ASSERT LIQUIDATED DAMAGE CLAIMS SINCE THE CONTRACT WAS EFFECTIVELY TERMINATED BY THE ACCOMMODATION REACHED ON JUNE 21, 1985 AND THERE IS NO EVIDENCE TO INDICATE THAT THE COMPLETION DATE REQUIREMENTS BECAME PART OF THE ACCOMMODATION.

As stated above, the parties FLP, MI and Neilsen entered into an accommodation on June 21, 1985. As part of that accommodation, FLP was to issue joint checks to MI and Neilsen based upon Neilsen's weekly invoicing. At no time during the testimony or trial of this case was any evidence presented that the completion date requirements ever became part of that accommodation. Neilsen asserts that the accommodation became a substitute for the contract without specific language regarding completion dates and liquidated damages; therefore, those provisions were no longer in effect and were unenforceable.

IV

NEILSEN HAS BEEN INJURED BY FLP'S NEGLIGENT ADMINISTRATION OF THE CONTRACT WITH MI.

FLP entered into a contract with MI and had a set payment schedule contained within the contract. In making the payments through June 10, 1985, FLP breached the terms of its agreement and negligently administered the contract to the detriment of the subcontractors. The losses experienced by the subcontractors were economic losses, but Neilsen asserts that the new trend in tort law is to allow recovery for economic loss under circumstances such as these.

A. FLP OWED A DUTY TO NEILSEN, ASTRO STEEL AND ALL OTHER SUBCONTRACTORS AND MATERIALMEN TO ACT REASONABLY AND RESPONSIBLY.

The language in paragraph 20 of the Contract creates an obligation to subcontractors. In paragraph 20, the agreement creates the duty to act reasonably and responsibly. The entire contract agreement, while not between Neilsen and FLP, clearly contemplated the use of subcontractors. In fact, paragraph 20 gives the owner the opportunity to refuse to allow certain subcontractors to perform work. This veto power creates even more of an obligation between the subcontractors and the owners than a usual contract.

This duty of due care is a standard tort requirement for finding of negligence. Normally, in order for finding of negligence, the Court must find that there was a duty, a breach of that duty, proximate cause and damages. This is true even

though the relationship comes out of a contractual relationship, see Section 93 of W. Prosser, The Law of Torts (4th Edition, 1971); D.C.R., Inc. v. Peak Alarm Company, 663 P.2d 433 (Utah 1983); Meece v. Brigham Young University, 639 P.2d 720 (Utah 1981); and Williams v. City of North Las Vegas, 541 P.2d 652 (Nev. 1975).

In this case, Neilsen was injured due to FLP's failure to exercise the degree of care which a reasonable person would have exercised under the same circumstances. Specifically, FLP negligently administered the contract by making payments to MI when it knew MI to be in breach of the completion clause of the contract and substantially behind in the work performed. This negligence continued when FLP made the final payment on the contract while the work was only thirty to forty percent completed.

B. PRIVITY IS NOT NECESSARY FOR NEILSEN TO RECOVER FOR ECONOMIC LOSS UNDER THE CIRCUMSTANCES OF THIS CASE.

The Trial Court held that, without privity, Neilsen could not recover under a negligence theory for economic loss. This is not supported by the law of Nevada or of surrounding states. In the Williams case cited above, the Nevada Court found that even though the injured party was a stranger to the contract, he could recover. In addition, both the courts of Arizona and Colorado have determined that the contractual obligation is not necessarily the requirement for recovery, see Metropolitan Gas Repair Service, Inc. v. Kulak, 621 P.2d 313

(Colo. 1980); Cosmopolitan Homes, Inc. v. Wheeler, 663 P.2d 1041 (Colo. 1983); and Brown v. Martin Marietta Corp., 690 P.2d 889 (Colo. App. 1984).

The Idaho courts have perhaps taken this further in ruling directly on the issue of privity and economic loss, the Idaho court in State v. Mitchell Construction Company, 699 P.2d 1349 (Idaho 1985) specifically ruled that privity of contract is not required in a contract action to recover economic loss. This, combined with the D.C.R. case, indicates that the growing trend among the courts is to bypass the privity requirement particularly when dealing with subcontractors, contractors and owners.

It may make good sense to require privity when a third-party stranger is injured only economically as a result of negligence in the administration of a contract. However, that was not the case here. Neilsen was not a stranger third-party. He was a subcontractor that specifically had to be approved by both the owner and MI. This approval requirement may even have created the privity Defendant/Respondent claims is necessary in an economic loss negligence action. However, Neilsen maintains under the law of D.C.R., Williams and the other cases cited, privity is no longer a requirement in contractor, subcontractor or owner cases and respectfully requests the court to remand this action for further hearing on the issue of negligence.

performing the actual work were properly paid as required by paragraph 20 of the Contract. Further, Neilsen performed additional work after the accommodation agreement for which he was not paid. FLP claims that they paid an invoice amount; however, the testimony does not support that they paid the full amount of those invoices.

If Neilsen is a third-party beneficiary, which the Trial Court found, he is not subject to all defenses that can be raised by FLP. FLP cannot claim that, due to MI's failure to meet the completion date, Neilsen should be barred from collecting damages. This is true for several reasons, not the least of which is the fact that, by the time FLP asserted any of these claims, it was impossible for Neilsen to complete the project. Also, FLP clearly waived its rights to assert the liquidated damages provisions, both by its conduct in breaching the contract and by making the final payment as provided for in paragraph 23.3 of the Contract.

While the Trial Court felt that the oral agreements between Neilsen and FLP were bound by the Statute of Frauds, they clearly were not. Actions by FLP and Neilsen both removed the oral agreements from the Statute of Frauds. The part performance by Neilsen and FLP and the inducement by FLP to have Neilsen to continue on the job were just such actions. Both acting together removed the oral agreements from the Statute of Frauds and render them enforceable. The question of damages under the oral agreement was submitted by Neilsen and not controverted.

C. THERE WAS SUFFICIENT TESTIMONY TO ESTABLISH FLP'S NEGLIGENCE IN ADMINISTERING THE CONTRACT.

During the trial of this action, two experts testified regarding FLP's administration of the contract. (T. Vol. 2 pp 102-149). In this testimony, both experts essentially agreed that FLP's payment to MI prior to its completion of the work and at the stake at which it had been completed were not proper. At the conclusion of the testimony that was presented, the Court refused to allow further testimony regarding issues of damages and ruled that the recovery under negligence for economic loss was not appropriate. Therefore, this Court should remand this case to the Trial Court on the issues of the establishment of damages of economic loss.

CONCLUSION AND RELIEF SOUGHT

Neilsen has more than adequately set forth that this case is not a simple contractor gone bad case. There were numerous issues involved, including the questions of third-party beneficiaries, unjust enrichment, negligence and oral contracts. Neilsen has meet his burden on all of these issues.

As to the question of unjust enrichment, Neilsen submits that it is FLP who made the mistake and cannot hide behind its own incompetence in paying out the contract price to MI while not properly supervising either the work or delivery of materials. Had FLP properly supervised its work, it would not have paid out the amount of money it claims to have paid. Rather, it would have seen that subcontractors who were

FLP's negligent administration of its own contract resulted in a substantial loss to Neilsen and to others. FLP was negligent in paying MI the full contract price when the marina was only thirty to forty percent complete and not all materials had been delivered to the site. FLP had an employee on site to verify delivery and work. However, he failed to do so. Under the circumstances, the claim by FLP that privity is necessary for recovery of an economic loss under a theory of negligence is incorrect. The trend in the case law is to allow recovery where there is a relationship even if that relationship does not amount to privity.

Neilsen respectfully requests this Court to reverse the Trial Court and enter judgment on the issues of unjust enrichment, defenses to third-party beneficiaries and/or his oral agreement with FLP. As to the claim for negligence, Neilsen respectfully requests this Court to remand the case for trial on the issue of damages alone.

Respectfully submitted this _____ day of June, 1988.

P. Gary Ferrero
Attorney for Ronald K. Neilsen
d/b/a Marina Mechanics
Plaintiff/Appellant

CERTIFICATE OF DELIVERY

I hereby certify that I delivered a true and correct copy of the foregoing Brief of Appellant Ronald K. Neilsen d/b/a Marina Mechanics Enterprises, to the following, this _____ day of June, 1988:

George A. Hunt
Ryan E. Tibbets
Snow, Christensen & Martineau
Attorneys for Respondents
10 Exchange Place, 11th Floor
P.O. Box 45000
Salt Lake City, Utah 84145

J. Ray Barrios, P.C.
Mueller, Barrios & Christensen
Attorney for Appellant Astro Steel Corp.
777 Clark Leaming Center
175 South West Temple
Salt Lake City, Utah 84101

_____

ld neilflp.bri

ADDENDA

ADDENDUM "A" - CONTRACT BETWEEN MARINAS INTERNATIONALE & FOREVER LIVING PRODUCTS - Plaintiff's 2

Marinas Internationale Ltd.

The world's finest floating marinas.

SALES CONTRACT

ıte _____ Contract No. _____

BILLING INFORMATION		SHIPPING INFORMATION	
:oject Name	Callville Bay Marina	Ship to	Callville Bay Marina
ıstomer	Forever Resorts	Address	Box 100 Star Rt. 10
ıdress	1000 Nevada Hyw. Suite 207	City	Las Vegas State Nv. Zip 89124
ıty	Boulder City State Nv. Zip 89005	Country	USA
ɔuntry	USA	Contact	Phone ( )

PRODUCT

Marinas Internationale, Ltd. (Company) agrees to provide the following materials and equipment according to the attached specifications and marina plan entitled Callville Bay Marina - 12/7/84 (approx 79,000 sq and in accordance with the WORK AND DELIVERY SCHEDULE.

PRICE

The Customer agrees to pay for the following according to the PAYMENT SCHEDULE:

Product		Price
Floating Docks:		
°Laminated marina decking, thickness to be 4 "		
°Polyethylene pontoons, freeboard to be 16"-17'		
°Dock fender (specify)		
°Polyurethane foam		
°Bolts, cleats, pile guides		
°Other necessary hardware, per plan	Total	$1,776,085.00
Gangways (specify): _____	not included	
Utilities:	not included	
Other: Anchoring	113,710.00	
Assembly & Installation	~~193,965.00~~	
Roof Structure per plan	included	
	TOTAL	$307,675.00
Freight (circle) C.I.F., C&F, F.O.B. Common Carrier, F.A.S., C.O.D., at _____		included
TOTAL		$2,083,760.00

Customer agrees to pay all applicable permit, fees, duties and taxes whether sales, use, [illegible] excise, or other.

380 Herndon Parkway • Herndon, VA 22070 U.S.A.
703/689-2600 Telex: 248762 MARINA UR Cable: Marinas Int.,
Concord, CA • Ft Myers, FL • Chicago, IL • St. Louis MO • New York, NY •
Australia • Bahrain • Hong Kong • Kuwait • Saudi Arabia • United Arab

[redacted]

Date December 10, 1984 Project Name Callville Bay Marina

3. WORK AND DELIVERY SCHEDULE

Work	Delivery
Materials begin to arrive at job site within	30 days from contract execution
Detail design complete and assembly begins	45 days from contract execution
Breakwater, C, D, and E piers completed to allow for boat rentals - (approx. 5/1 assuming 12/12/84 contract execution) - MI portion only. Does not account for utilities installation	150 days from contract execution
Final completion & acceptance	180 days from contract execution

4. PAYMENT SCHEDULE

% Due	Amount Due	Upon These Conditions
Materials:		
10%	$188,979.50	Initial deposit, indicating execution of contract
90%	$1,700,815.50	Due per payment terms as materials are delivered to job site
Total	$1,889,795.00	

Labor:

90%	$174,555.00	Due per terms as work in completed
10%	$19,410.00	Due upon final completion
Total	$193,865.00	

Total amount of contract $2,083,760.00.

The Customer shall make progress payments to the Company as follows: 10% down with order and irrevocable letter of credit in favor of Marinas Internationale, Ltd. with authorized draws based on receipt of materials and work performed. The Customer will be invoiced upon the Contractor issuing purchase orders. However, payment shall be due 7 days after materials arrive on site or upon arrival at a mutually agreed upon storage area, according to a statement of values which will be issued at the time contractor issues purchase orders. If payment is delayed beyond ten (10) days of when due, the contract price shall, without prejudice to the Company's right to immediate payment, be increased by 1 1/2% per month on the unpaid balance, but not to exceed the maximum amount permitted by law. Owner agrees to provide bank references and/or financial statements as Company may require. All prices quoted are valid for ninety (90) days.

5. DELAYS

The Company shall be excused for delay in performance due to any cause beyond its control, including but not limited to fire, flood, act of God, war, act of government, act or omission of Customer, strike or labor trouble. The time of performance shall be extended for a time equal to the period of the delay and its consequences.

6. TITLE AND INSURANCE

Title to the products and risk of loss or damage shall pass to Buyer upon tender of delivery, except that a security interest in the product or any replacement shall remain in Company, regardless of mode of attachment to realty or other property, until the full price has been paid in cash. Buyer agrees to do all acts necessary to perfect and maintain said security interest, and to protect Company's interest by adequately insuring the product(s) against loss or damage from any external cause with Company named as insured or co-insured. Marinas Internationale agrees to pay the deductible for any such claims.

7. STORAGE COSTS

Any part of the marina product which must be stored due to delay caused by the Customer will be placed in storage by the Company at cost and risk to the Customer

8. WARRANTY

The Company warrants to the Customer that the following materials supplied by the Company will be free from defects under normal use and service for a period of five (5) years from date of installation: fender, foam, bolts, cleats, anchoring guides, and a ten (10) year warranty on the pontoons. Company will furnish, repair or replace without cost to the Customer any part, assembly or portion thereof which shall be determined to be defective. The laminated plank carries a 30 year limited warranty against decay which is provided by the manufacturer of the preservative treatment. The Company provides a 5 year warranty against defects in the laminated plank provided

recommended maintenance is followed. (See Specifications for recommended maintenance details). The Company provides a 5 year warranty on the roof materials and design. Other, separately listed items such as utilities products and components, gangways, pilings and other accessories shall be covered only by the express warranty of the manufacturer or supplier thereof. The Company will not be responsible for consequential or incidental damages.

9. PENALTY

Company agrees to accept penalty clause of $800.00 per day, $4,000.00 per week for delays in meeting performance schedule in accordance with paragraph 5 of contract, "DELAYS".

10. SECURITY INTEREST

The Company reserves and the Customeer grants to the Company a Security Interest in the marina materials and all proceeds thereof for the purpose of securing the balance of payments due under this Contract. The Customer agrees to sign any financing statements which the Company deems reasonably necessary to protect this Security Interest. The Company is also granted an irrevocable power of attorney to execute such financing statements on the Customer's behalf. This Security Interest shall terminate when the Customer has satisfied all of its obligations under this Contract.

11. SITE PREPARATION

Customer agrees to provide and prepare a suitable assembly site for construction according to specifications to be provided by Company This site will include utilities and any special use permits, if

needed.

12. SHORESIDE COSTS

Customer agrees to assume shoreside and bulkhead preparation costs associated with installation, including utility services and gangway assembly.

13. CHANGE ORDER

Design alterations after (Purchaser's) approval of final pier and utility configuration will be done only through written change order. (Purchaser) may submit a request for change order detailing anticipated or desired alteration. Marinas Internationale will then inform the Purchaser of the impacts, if any, of the proposed alteration on the cost and schedule of materials delivery. Acceptance, in writing, of these by (the Purchaser) will constitute an approved change order and a contract modification.

14. SALES CONTRACT SUPPLEMENT

The Company and the Customer agree to the following additional contract terms and details:

a. Customer to provide adequate security and is responsible for loss due to theft or vandalism. Company is responsible for loss due to damage during shipping, assembly and installation.

b. Customer to provide electricity and lighting necessary to assemble during nighttime if needed to complete marina on schedule.

c. Gale Brimhall or other personnel as approved by Customer to perform monthly on-site Q.C. inspection during installation.

d. Company agrees to provide Customer the marina anchoring system

at cost in an effort to save money. The price of $113,710.00 is Customer's estimated cost of the anchoring and agrees to pay to the Contractor any additional costs over $113,710.00 up to the amount of $215,450.00. Contractor agrees to pay for any anchoring costs over $215,450.00.

e. The contract price of $2,083,760.00 is based upon Customer providing materials and services which are listed in letter from K. Larson to R. Ham dated 10/16/84. Company will allow further agreed upon deductions if Customer can provide additional materials or services to Company.

15. MARKETING SUPPORT

Company to provide marketing support and assistance to Customer to include:

- National Park Service presentation
- Display dock and pictures for use in sales of slips
- A color rendering of project to be used for promotion and sales
- Reasonable on-site assistance and training to assist Customer in meeting their marketing objectives.

16. UTILITY DESIGN

Company agrees to privide complete utility designs and specifications to Customer for its use in requesting quotations. Company agrees to cooperation with utility contractor in expediting

utility installation.

GENERAL CONDITIONS

Marinas Internationale is herein known as COMPANY and/or CONTRACTOR. Forever Resorts is herein known as CUSTOMER and/or OWNER.

17. CONTRACT DOCUMENTS

The Contract Documents consist of this Agreement with General Conditions, Supplementary and other Conditions, the Drawings, the Specifications, accepted alternates and all Modifications after execution of the Contract such as Change Orders, written interpretations and written orders for minor changes in the Work. The intent of the Contract Documents is to include all items necessary for the proper execution and completion of the Work. The Contract Documents are complementary, and what is required by any one shall be as binding as if required by all. Work not covered in the Contract Documents will not be required unless it is consistent therewith and reasonably inferable therefrom as being necessary to produce the intended results.

17.1 Execution of the Contract by the Company is a representation that the Company has visited the site and is familiar with the local conditions under which the Work is to be performed.

17.2 The Work comprises the completed construction required by the Contract Documents and includes all labor necessary to produce such construction, and all materials and equipment incorporated or to be incorporated in such construction.

18. CUSTOMER

If the Company fails to correct defective Work or persistently fails to carry out the Work in accordance with the Contract Documents, the Owner, by a written order, may order the Company to stop the Work, or any portion thereof, until the cause for such order has been eliminated; however, this right of the Customer to stop the Work shall not give rise to any duty on the part of the Owner to exercise this right for the benefit of the Contractor or any other person or entity.

19. COMPANY

The Company shall supervise and direct the Work, using the Company's best skill and attention, and the Company shall be solely responsible for all construction means, methods, techniques, sequences and procedures and for coordinating all portions of the Work under the Contract.

19.1 Unless otherwise specifically provided in the Contract Documents, the Company shall provide and pay for all labor, materials, equipment, tools, construction equipment and machinery, water, heat, utilities, transportation, and other facilities and services necessary for the proper execution and completion of the Work, whether temporary or permanent and whether or not incorporated or to be incorporated in the Work.

19.2 The Company shall at all times enforce strict discipline and good order among the Company's employees and shall not employ on the Work, any unfit person or anyone not skilled in the task assigned to them.

19.3 The Company warrants to the Customer that all materials and equipment incorporated in the Work will be new unless otherwise specified, and that all Work will be of good quality, free from faults and defects and in conformance with the Contract Documents. All Work not conforming to these requirements may be considered defective.

19.4 The Company shall give all notices and comply with all laws, ordinances, rules, regulations, and lawful orders of any public authority bearing on the performance of the Work, and shall promptly notify the Owner if the Drawings and Specifications are at variance therewith.

19.5 The Company shall be responsible to the Customer for the acts and omissions of the Company's employees, Subcontractors and their agents and employees, and other persons performing any of the Work under a contract with the Company.

19.6 The Company shall review, approve and submit all Shop Drawings, Product Data and Samples required by the Contract Documents. The Work shall be in accordance with approved submittals.

19.7 The Contractor at all times shall keep the premises free from accumulation of waste materials or rubbish caused by the Company's operations. At the completion of the Work the Company shall remove all such waste materials and rubbish from and about the Project as well as the Company's tools, construction equipment, machinery and surplus materials.

19.8 The Company shall pay all royalties and license fees; shall defend all suits or claims for infringement of any patent rights and

shall save the Owner harmless from loss on account thereof.

19.9 To the fullest extent permitted by law, the Company shall indemnify and hold harmless the Customer and his agents and employees from and against all claims, damages, losses and expenses, including but not limited to attorney's fees arising out of or resulting from the performance of the Work, provided that any such claim, damage, loss or expense (1) is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself) including the loss of use resulting therefrom, and (2) is caused in whole or in part by any negligent act or omission of the Company, any Subcontractor, anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable. Such obligation shall not be construed to negate, abridge, or otherwise reduce any other right or obligation of indemnity which would otherwise exist as to any party or person described in this paragraph 19.9 in any and all claims against the Customer or any of his agents or employees by any employee of the Contractor, any Subcontractor, anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable, the indemnification obligation under this Paragraph 19.9 shall not be limited in any way by any limitation on the amount or type of damages, compensation or benefits payable by or for the Contractor or any Subcontractor under Workers' or Workmen's Compensation Acts, disability benefit acts or other employee benefit acts.

19.10 Company to accept responsibility for wages, workman's

ompensation, insurance, etc. as necessary for all personnel it mployees while performing assembly and installation. Customer agrees o cooperate, if possible and without risk, to any assistance to ompany it can provide relative to conforming with State of Nevada ontract and labor requirements.

0. SUBCONTRACTS

A Subcontractor is a person or entity who has a direct contract lth the Contractor to perform any of the Work at the site.

).1 Unless otherwise required by the Contract Documents or in the .dding Documents, the Contractor, as soon as practicable after the ard of the Contract, shall furnish to the Owner in writing the names ' Subcontractors for each of the principal portions of the Work. The ntractor shall not employ any Subcontractor to whom the Owner may ve a reasonable objection. The Contractor shall not be required to ntract with anyone to whom the Contractor has a reasonable objection. ntracts between the Contractor and the Subcontractors shall (1) quire each Subcontractor, to the extent of the Work to be performed the Subcontractor, to be bound to the Contractor by the terms of the ntract Documents, and to assume toward the Contractor all the ligations and responsibilities which the Contractor, by these uments, assumes toward the Owner and (2) allow to the Subcontractor benefit of all rights, remedies and redress afforded to the ntractor by these Contract Documents.

21. WORK BY CUSTOMER OR BY SEPARATE CONTRACTORS

The Customer reserves the right to perform work related to the Project with the Customer's own forces, and to award separate contracts in connection with other portions of the Project or other work on the site under these or similar Conditions of the Contract.

21.1 The Company shall afford the Customer and separate contractors reasonable opportunity for the introduction and storage of their materials and equipment and the execution of their work, and shall connect and coordinate the Contractor's Work under this Contract with theirs as required by the Contract Documents.

21.2 Any costs caused by defective or ill-timed work shall be borne by the party responsible therefor.

22. MISCELLANEOUS PROVISIONS

The Contract shall be governed by the law of the place where the Project is located.

23. PAYMENTS AND COMPLETION

Payments shall be made as provided in 4. of the Agreement.

23.1 Payments may be withheld on account of (1) defective Work not remedied, (2) claims filed, (3) failure of the Contractor to make payments properly to Subcontractors or for labor, materials or equipment, (4) damage to the Owner or another contractor, or (5) persistent failure to carry out the Work in accordance with the Contract Documents.

23.2 Final payment shall not be due until the Contractor has delivered to the Owner a complete release of all liens arising out of this

Contract or receipts in full covering all labor, materials and equipment for which a lien could be filed, or a bond satisfactory to the Owner indemnifying the Owner against any lien. If any lien remains unsatisified after all payments are made, the Company shall refund to the Customer all monies the latter may be compelled to pay in discharging such lien, including all costs and reasonable attorney's fees.

23.3 The making of final payment shall constitute a waiver of all claims by the Customer except those arising from (1) unsettled liens, (2) faulty or defective Work appearing after Substantial Completion, (3) failure of the Work to comply with the requirements of the Contract Documents, or (4) terms of any special warranties required by the Contract Documents. The acceptance of final payment shall constitute a waiver of all claims by the Contractor except those previously made in writing and identified by the Contractor as unsettled at the time of the final Application for Payment.

24. PROTECTION OF PERSONS AND PROPERTY

The Company shall be responsible for initiating, maintaining, and supervising all safety precautions and programs in connection with the Work. The Company shall take all reasonable precautions for the safety of, and shall provide all reasonable protection to prevent damage, injury or loss to (1) all employees on the Work and other persons who may be affected thereby, (2) all the Work and all materials and equipment to be incorporated therein, and (3) other property at the site or adjacent thereto. The Company shall give all notices and

comply with applicable laws, ordinances, rules, regulations and orders of any public authority bearing on the safety of persons and property and their protection from damage, injury or loss. The Contractor shall promptly remedy all damage or loss to any property caused in whole or in part by the Contractor, any Subcontractor, and Sub-sub-contractor, or anyone directly, or by anyone for whose acts any of them may be liable, except damage or loss attributable to the acts or omissions of the Owner or anyone directly employed by him or by anyone for whose acts either of them may be liable, and not attributable to the fault or negligence of the Contractors.

24. CHANGES IN THE WORK

The Owner, without invalidating the Contract, may order changes in the Work consisting of additions, deletions, or modifications, the Guaranteed Maximum Cost, if any, and the Contract Time being adjusted accordingly. All such changes in the Work shall be authorized by written Change Order signed by the Owner.

24.1 The Guaranteed Maximum Cost, if any, and the Contract Time may be changed only by Change Order.

24.2 The cost or credit to the Owner from a change in the Work shall be determined by mutual agreement.

25. TERMINATION OF THE CONTRACT

If the Contractor defaults or persistently fails or neglects to carry out the Work in accordance with the Contract Documents or fails to perform any provision of the Contract, the Owner may, after 30 day's writen notice to the Contractor, make good such deficiencies and may

deduct the cost thereof from the payment then or thereafter due the Contractor or, at the Owner's option that sufficient cause exists to justify such action, may terminate the Contract and take possession of the site and of all materials, equipment, tools, and construction equipment and machinery thereon owned by the Contractor and may finish the Work by whatever method the Owner may deem expedient; and if the unpaid balance of the Guaranteed Maximum Cost, if any, exceeds the expense of finishing the Work, such excess shall be paid to the Contractor, but if such expense exceeds such unpaid balance, the Contractor shall pay the difference to the Owner.

26. ACCOUNTING RECORDS

The Contractor shall check all materials, equipment and labor entering into the anchor/winch system and shall keep such full and detailed accounts as may be necessary for proper financial management under this Agreement. The Owner shall be afforded access to all the Contractor's records relating to this anchor/winch system.

27. SPECIFICATIONS

Company agrees to provide all materials in accordance with its published materials specifications sheet, copy attached.

28. ENTIRE CONTRACT

This Contract, including the SALES CONTRACT SUPPLEMENT where applicable, constitutes the entire Contract between the Customer and the Company regarding the purchase of the marina materials noted above. This contract supercedes any prior written or oral agreements. This Contract may only be amended by a written instrument executed by both

parties.

Marinas Internationale, Ltd.	Customer CALLVILLE BAY MARINA
By: [signature]	By: Tom Mace
Date: 14 Dec 1984	Date: 12/14/84
By:	By:
Date:	Date:
	Customer warrants that the specifications and marina plan have been approved and are herewith attached.
	[initial]
	(initial)

ADDENDUM "B" - MARINA MECHANICS' REQUEST FOR PAYMENT #6-Plaintiff's 25

MARINA MECHANICS ENT.
8537 SCOTTISH DRIVE
SANDY, UTAH 84092
(801) 942-1832

REQUEST FOR PAYMENT #6

Date: 6-12-85

TO: MARINAS INTERNATIONALE LTD.
457A Carlisle Drive
Herndon, VA. 22070
ATTEN: Tom Allgyer

RE: JOB #A101-Nev.

Contract Re: Callville Bay Marina/Lake Mead, Nevada

DOCK ASSEMBLY BASE CONTRACT:	$150,696.00
ROOF ASSEMBLY BASE CONTRACT:	301,900.00
ANCHORING BASE CONTRACT:	101,580.00
AMENDMENT #1 BASE CONTRACT: (ANCHOR)	11,211.00
BACKCHARGES (TO 6-12-85)	71,311.59
TOTAL CONTRACT TO DATE:	$672,701.59

	MOBILIZATION	MATERIAL	Labor	Total
Dock Assembly	20,000.00	41,516.00	89,180.00	150,696.00
Roof Assembly	-0-	210,300.00	61,600.00	301,900.00
Anchoring	10,000.00	47,300.00	43,720.00	101,300.00
Amendment #1	5,000.00	30,707.00	5,501.20	11,211.00
Backcharges	-0-	12,302.10	62,012.19	71,311.59
Total Contract to Date	35,000.00	372,718.20	261,983.39	672,701.59
Work Complete to Date	35,000.00	307,152.20	190,523.39	532,975.59
Net Invoice to Date	35,000.00	307,152.20	190,523.39	532,975.59
Less Previous Payments	(35,000.00)	(173,198.30)	(74,795.22)	(282,991.02)
Due This Invoice	-0-	121,253.10	115,728.17	219,991.57

Make Check Payable to: MARINA MECHANICS ENT.

Sincerely,

MARINA MECHANICS ENT.

Ronald K. Neilsen
Owner

RKN/gn

PLAINTIFF'S EXHIBIT 25 C85-6367

ADDENDUM "C" - FINDINGS OF FACT AND CONCLUSIONS OF LAW RE:
DEFENDANT'S MOTION FOR INVOLUNTARY DISMISSAL

GEORGE A. HUNT (A1586)
RYAN E. TIBBITTS (A4423)
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Salt Lake City, UT 84145
Telephone: (801) 521-9000

IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

RONALD K. NEILSON, dba MARINA MECHANICS ENTERPRISES, and ASTRO STEEL CORPORATION, a Utah corporation (Intervenor),	FINDINGS OF FACT AND CONCLUSIONS OF LAW RE: DEFENDANT'S MOTION FOR INVOLUNTARY DISMISSAL
Plaintiffs,	
vs.	
FOREVER LIVING PRODUCTS, INC.,	Case No. C85-6367
Defendant.	Judge Timothy R. Hanson

This matter came on regularly before the court for a non-jury trial on June 9, 1987, the Honorable Timothy R. Hanson, District Judge, presiding; Edwin T. Peterson of Maddox & Snuffer appearing for plaintiff, Ronald K. Neilson, dba Marina Mechanics Enterprises, (hereinafter "Neilson"); J. Ray Barrios of Mueller, Barrios & Christiansen, appearing for plaintiff intervenor Astro Steel Corporation, (hereinafter "Astro"); and

George A. Hunt and Ryan E. Tibbitts of Snow, Christensen & Martineau appearing for defendant Forever Living Products, Inc., (hereinafter "FLP"); and the plaintiff and plaintiff intervenor having adduced evidence by way of testimony and documentary exhibits and having argued the matter to the court, and the court having reviewed the file, exhibits and memoranda submitted by the parties and being fully advised in the premises, and the defendant having moved for involuntary dismissal of the claims of plaintiff and intervenor pursuant to Utah R. Civ. P. 41(b) and the court having considered arguments of counsel, and good cause appearing, now, therefore, the court hereby makes the following

FINDINGS OF FACT

1. Plaintiff Ronald K. Neilson is an individual residing in the State of Utah and doing business as Marina Mechanics, Enterprises, a sole proprietorship with its principal place of business in Salt Lake County, State of Utah.

2. Plaintiff Intervenor, Astro Steel Corporation, is a Utah corporation in good standing with its principal place of business in Salt Lake County, State of Utah.

3. Defendant, Forever Living Products, Inc., is an Arizona corporation registered to do business in the State of Utah, and doing business in, among other locations, the State of Nevada.

4. The claims of Neilson and Astro arose in the State of Nevada.

5. On December 12, 1984, a General Construction Contract was entered between FLP and Marinas Internationale which created a direct economic relationship between them.

6. None of the parties have adduced any evidence proving that FLP intentionally interfered with the contractual relations between Marinas Internationale and Neilson.

7. All damages suffered by Neilson and Astro as shown by the evidence adduced in this action are purely economic in nature. No damage to persons or property has been proved.

8. The only evidence adduced by plaintiff to support a claim for damages for breach of oral contract is that FLP promised to "recoup Neilson's losses." Such representations, if made, constitute a promise by FLP to answer for a debt of Marinas Internationale.

9. No promise was made by FLP to Astro to pay the balance due Astro by Marinas Internationale.

10. Neilson failed to pay the workman's compensation premiums required by Nevada law long before Marinas Internationale declared bankruptcy on June 13, 1985. The failure to make these required payments was the sole cause of Neilson being forced to leave the Callville Bay Marina construction site and to cease construction work in the State of Nevada.

11. All the work performed by Neilson after July 9, 1985, pursuant to the arrangement between the parties, was paid for in full by FLP pursuant to invoices submitted by Neilson.

From the foregoing Findings of Fact, the court draws the following

CONCLUSIONS OF LAW

1. The State of Nevada is the state with the most significant relationship to the transactions here in question. Therefore, Nevada law applies.

2. FLP had a significant financial interest and its own contractual relationship which justified any interference with the Neilson-Marinas Internationale Installation Contract.

3. The economic losses suffered by Neilson and/or Astro are not recoverable and do not support a claim of negligence.

4. Any oral promises made by FLP to Neilson are barred pursuant to the applicable statute of frauds, Nev. Rev. Stat. § 111.220 (1986), as promises to answer for the debt of another.

5. The evidence adduced is too vague and indefinite to support the finding of an oral contract between the parties to this action.

6. Defendant's Motion for Involuntary Dismissal should be granted against both plaintiff and intervenor in accordance herewith and an appropriate Judgment of Dismissal entered.

DATED this _____ day of August, 1987.

Timothy R. Hanson
District Court Judge

SCMCLERK17

AFFIDAVIT OF SERVICE

STATE OF UTAH)
) ss.
COUNTY OF SALT LAKE)

Lynn Frear, being duly sworn, says that she is employed in the law offices of Snow, Christensen & Martineau, attorneys for defendant herein; that she served the attached FINDINGS OF FACT AND CONCLUSIONS OF LAW RE: DEFENDANT'S MOTION FOR INVOLUNTARY DISMISSAL (Case No. C85-6367, Salt Lake County) upon the parties listed below by placing a true and correct copy thereof in an envelope addressed to:

J. Ray Barrios
MUELLER, BARRIOS & CHRISTIANSEN
777 Clark Leaming Office Center
175 South West Temple
Salt Lake City, Utah 84101

Denver C. Snuffer
MADDOX & SNUFFER
64 East 6400 South, Suite 120
Murray, Utah 84107

HAND DELIVERED

and causing the same to be ~~mailed, first class, postage prepaid,~~ on the 31st day of July, 1987.

Lynn Frear
Lynn Frear

SUBSCRIBED AND SWORN TO before me this 31st day of July, 1987.

Patricia B. Burch
NOTARY PUBLIC
Residing in Salt Lake County, Utah

My commission expires:

7/10/88

ADDENDUM "D" - AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW

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IN THE THIRD JUDICIAL DISTRICT COURT OF SALT LAKE COUNTY

STATE OF UTAH

RONALD K. NEILSON, dba MARINA MECHANICS ENTERPRISES, and ASTRO STEEL CORPORATION, a Utah corporation (Intervenor),	AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW
Plaintiffs,	
vs.	
FOREVER LIVING PRODUCTS, INC.,	Case No. C85-6367
Defendant.	Judge Timothy R. Hanson

This matter came on regularly before the court for a non-jury trial on June 9, 1987, the Honorable Timothy R. Hanson, Utah State District Judge, presiding; Edwin T. Peterson of Maddox & Snuffer appearing for plaintiff, Ronald K. Neilson, dba Marina Mechanics Enterprises, (hereinafter "Neilson"); J. Ray Barrios of Mueller, Barrios & Christiansen, appearing for plaintiff intervenor Astro Steel Corporation, (hereinafter "Astro"); and George A. Hunt and Ryan E. Tibbitts of Snow,

Christensen & Martineau appearing for defendant Forever Living Products, Inc., (hereinafter "FLP"); and the parties having adduced evidence by way of testimony and documentary exhibits and having argued the matter to the court, and the court having reviewed the file, exhibits and memoranda submitted by the parties and being fully advised in the premises, and good cause appearing, now, therefore, the court hereby makes the following:

FINDINGS OF FACT

1. On April 29, 1982, FLP entered into a Concessionaire's Lease with the United States of America, Department of the Interior to act as a concessionaire on United States government property. This property is located at Callville Bay in the Lake Mead National Recreation area, within the State of Nevada.

2. Paragraph 20 of the Department of Interior Lease provided the United States Secretary of the Interior with the option of requiring a completion bond for any construction work performed on their leased Callville Bay property.

3. The United States Secretary of the Interior did not, at any time, require a completion bond for any work relating to the Callville Bay Marina.

4. The only third party benefits claimed by Neilson and Astro under the Department of Interior lease were those allegedly provided under paragraph 20 of the lease.

5. On December 14, 1984, FLP entered into a General Construction Contract with Marinas Internationale, a Virginia corporation, for construction of a marina on Callville Bay, Lake Mead, Nevada.

6. The base dollar amount for the construction of the marina per the General Contract between FLP and Marinas Internationale was $2,083,760.00. The General Contract also contained a mechanism whereby Marinas Internationale was to be paid an amount for anchoring the dock system, based upon actual cost, but not to exceed $101,740.00.

7. The General Contract between FLP and Marinas Internationale provided that the marina was to be completed no later than June 12, 1985.

8. On March 1, 1985, Marinas Internationale entered into a subcontract with Neilson, entitled "Installation Contract", whereby plaintiff was to perform services relative to the construction of the marina.

9. The Installation Contract between Marinas Internationale and Neilson required Marinas Internationale to pay $150,696.00 for the installation of the dock, which was based on a price of $1.75 per square foot for 86,112 square feet of dock. The Installation Contract further required Neilson's work to be completed by May 31, 1985, incorporated by reference the provisions of the contract between FLP and

Marinas Internationale, and required Neilson to be bound thereby.

10. On March 11, 1985, Neilson began to perform as subcontractor at Callville Bay in the assembling and construction of the marina's floating dock system.

11. On March 28, 1985, a change order to the contract between Marinas Internationale and Neilson was issued requiring Neilson to fabricate and provide certain anchor blocks on the marina at an additional cost to Marinas Internationale of $41,211.00

12. Beginning with the original down payment in December of 1984, and continuing through February, March, April, May and to June 10, 1985, FLP paid a total of $2,109,168.50 to Marinas Internationale for materials and labor involved in the construction of the marina.

13. On June 13, 1985, Marinas Internationale, the general contractor, filed for relief under Chapter 11 of the United States Bankruptcy Code. FLP had no prior knowledge or warning of this action.

14. After the bankruptcy filing, Neilson refused to perform further work unless some measures were taken to ensure payment to him for such work. On June 21, 1985, a joint accommodation was reached among Neilson, FLP, and Marinas Internationale whereby Neilson would be paid by joint check

(payable to Neilson and Marinas Internationale) based upon time and material invoices to be submitted. Neilson proceeded and continued to perform work on this basis until August 26, 1985, when he was ousted from the project for nonpayment of State insurance fees.

15. On July 9, 1985, a severe storm arose in the Lake Mead area and extensively damaged the marina, which was still under construction at the time.

16. On July 15th, FLP met with Neilson and discussed storm damage repair work. Prior to the storm, FLP had paid a total of $52,132.70 in joint checks to Marinas Internationale/ Neilson.

17. On August 26, 1985, Neilson was ordered to cease performing construction work in Nevada by the State Industrial Insurance System of Nevada for nonpayment of insurance premiums. Thereafter, the remaining marina construction and storm damage repair work was completed by FLP using its own work forces.

18. On October 26, 1985, the Department of the Interior acknowledged completion and gave approval to open approximately one-half of the slips at the Callville Bay marina.

19. On January 6, 1986, the Department of the Interior, National Park Service, acknowledged completion of and gave its approval to open the completed marina.

20. FLP suffered significant economic loss in the form of additional project completion expenses and lost profits from slip rentals and other sources.

21. In addition to payments for storm damage repair, FLP paid the following amounts for the construction of the Marina:

$2,109,168.50	Total of checks paid to Marinas Internationale prior to the bankruptcy filing.
52,132.70	Total of joint checks paid prior to the storm of 7/9/85
70,000.00	Paid to Jessop Bros. Construction Co. for erection of Marina roof.
36,000.00	Paid by FLP to B&C Steel for the final truck load of steel.
$2,267,301.20	Total paid by FLP for completion of Marina, exclusive of payments for storm damage.

22. The agreement between FLP and Marinas Internationale contained provisions for the benefit of materialmen such as intervenor Astro Steel and such persons were intended third party beneficiaries of said contract.

23. The damages sustained by Astro Steel which are supported by the evidence amount to the sum of $101,300.00, together with prejudgment interest thereon.

24. Pursuant to the provisions of the agreement between FLP and Marinas Internationale, FLP is entitled to liquidated damages thereunder for late/noncompletion of the marina

construction project, which, together with the economic loss set forth in Finding of Fact 20 (above), more than offset the damage sustained by Astro Steel.

From the foregoing findings of fact, the court draws the following

CONCLUSIONS OF LAW

1. A binding contract existed between defendant FLP and the United States Department of Interior.

2. A binding contract existed between FLP and Marinas Internationale.

3. A binding contract existed between Marinas Internationale and Neilson.

4. Any rights and/or obligations which existed between FLP and Neilson were covered by express written agreements which preclude any recovery by Neilson based upon a theory of unjust enrichment.

5. The record contains insufficient evidence for the court to determine damages attributable to a claim of unjust enrichment by Neilson.

6. FLP paid a substantial sum for completion of the Callville Bay marina and therefore has not been unjustly enriched by either Neilson or Astro.

7. Under the terms of the Installation Contract, Neilson agreed to assume all the obligations that Marinas Internationale

had to FLP. The defenses and liquidated damages available to FLP under the General Contract excuse FLP from any performance or obligation to Neilson as a third party beneficiary and preclude any recovery by Neilson.

8. Both Neilson and Astro, by claiming third party beneficiary status, assume the rights and obligations of Marinas Internationale and subject themselves to all defenses available to FLP under the terms of the General Contract. Marinas Internationale is in material breach of the General Contract entered into with FLP. FLP is thereby excused from any further performance. Therefore, neither Neilson nor Astro may recover as third party beneficiaries to the general contract.

9. The liquidated and other damages available to FLP under the general contract offset any third party benefits claimed by Astro.

10. Defendant should be awarded a judgment in its favor and against both plaintiff and intervenor in accordance herewith.

DATED this 11th day of September, 1987.

/S/
Timothy R. Hanson
District Court Judge

APPROVED AS TO FORM:

MUELLER, BARRIOS & CHRISTIANSEN

By _____
J. Barrios
Attorneys for Intervenor

MADDOX & SNUFFER

By _____
Edwin T. Peterson
Attorneys for Plaintiff

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